No. 11535

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

J. W. VAN METER, B. B. GRANNING and J. D. M. TREECE, *Appellants*,

vs.

FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA, a corporation, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE HOWARD C. SPEAKMAN, *Judge*

APPELLEE'S BRIEF

CLARKE, CLARKE & ALBERTSON,
Attorneys for Appellee.

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INDEX

	Page
Statement of the Case	1
Argument	6
1. Coverage of an insurance policy may not be extended from one state to another by waiver or estoppel but such extension can only be accomplished by reformation	12
2. Reformation will be granted only where it appears by clear, cogent and convincing testimony that there was mutual mistake or fraud on the part of the insurance company	16
3. The insured is presumed and required to know the provisions of an insurance policy and must seasonably advise the company if he objects thereto. Failure to do so will constitute negligence which will prevent reformation	20
4. There was no error in the denial of a jury trial	22
5. The trial court was correct in granting the dismissal at close of appellants' case	23
Conclusion	26

TABLE OF CASES

Carew, Shaw & Bernascoin, Inc. v. General Casualty Co., 189 Wash. 329, 65 P.(2d) 689	7, 8, 10, 12, 13, 16, 20, 23, 24
Department of Labor & Industries v. Northwestern Mutual Fire Association, 13 Wn.(2d) 288, 124 P.(2d) 944	21
Erie Railway Co. v. Tompkins, 304 U.S. 64	8
Fidelity Guaranty & Fire Corporation v. Bilquist, 99 F.(2d) 333, 108 F.(2d) 713	6, 10, 12, 20, 23, 24
Fitzpatrick v. Sun Life Assurance Company of Canada, 1 Fed. R. Dec. 713	23
Henslin v. U. S. Fire Ins. Co., 152 Wash. 637, 278 Pac. 702	13
Miller v. Penn Mutual Life Ins. Co., 189 Wash. 269, 64 P.(2d) 1050	20
Reynolds v. Canton Insurance Office, 98 Wash. 425, 167 Pac. 1115	13

TEXTBOOKS

Page

29 Am. Jur. 178, §162, Insurance..... 19
2 Cooley's Briefs on Insurance (2d ed.) 1012..... 19
1 Couch's Cyclopedia of Insurance Law 312..... 19

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STATEMENT OF THE CASE

In order to properly present appellee's theory it will be necessary to make reference to certain facts omitted from appellants' statement of case and to comment upon certain logical inferences to be drawn therefrom.

Appellants bring suit as insured and loss payees under an insurance policy issued by appellee company covering certain logging equipment against loss by fire while located in the State of Washington. The equipment was moved first to Oregon and then to Cali-

fornia where it was involved in a fire which caused the damage for which recovery is sought.

Appellants first request reformation on the ground that the restriction of coverage to the State of Washington was contrary to the initial agreement between appellant Van Meter and the company as to the type of policy to be afforded, and contend secondly, that the company has so conducted itself as to be estopped to assert the coverage restriction.

The essential facts are briefly as follows:

Lipman & Esfeld, an insurance local agency representing various insurance companies, including appellee, and the American Discount Company, a financing concern, shared office space in the Smith Tower in Seattle. Appellant Van Meter, who was in the logging business, had upon various occasions for about five years financed his equipment through the American Discount Company and obtained insurance thereon through Lipman & Esfeld.

During this course of dealing, said appellant had been logging in various portions of the State of Washington (Tr. 83, 84). In November of 1944 he went to the aforesaid office in the Smith Tower and talked with Sol Esfeld, an officer of the American Discount Company and a former owner of the Lipman & Esfeld insurance agency, for the purpose of financing and insuring the logging equipment here in issue. Although at that time the ownership of the insurance agency had been transferred to Morton Pinch and Abe Goldman, Van Meter claims to have had no knowl-

edge of the transfer and to have proceeded upon the assumption that Esfeld still owned the agency.

The financing was arranged and appellant states upon the bottom of page 4 and the top of page 5 of his brief that Esfeld then agreed to cause to be issued a policy of marine insurance that would cover in any state.

We respectfully suggest that the record does not bear out this statement. While appellant was on the stand the trial judge made specific inquiry as to this point. Upon pages 116 and 117 of the transcript will be found the following questions and answers:

> "THE COURT: Do I understand you to say that he explained that to you?
>
> THE WITNESS: Yes.
>
> THE COURT: What did he say that was?
>
> THE WITNESS: That a Marine policy differed in the one way that it was good any place; a Marine policy—what it suggested to me was for boats or heavy industrial machinery, or something of that nature to be moved.
>
> THE COURT: Did he say anything about it covering property out of the State of Washington?
>
> THE WITNESS: I don't think so. I don't think it was discussed either way."

And on Tr. 118 the following:

> "THE COURT: What was said by either of you or him about insurance that covered you out of the State of Washington?

THE WITNESS: Well, I can't positively say just what was said.

THE COURT: Was there anything said about it?

THE WITNESS: I just wouldn't want to answer that 'Yes' or 'No' and be honest with you."

While appellants contend that Sol Esfeld and his associates knew from the first that appellant Van Meter was contemplating a move of his business operations to the State of Oregon, and infer therefore that they should have arranged to afford him unlimited insurance coverage, it is interesting to note that when definite advices of the proposed move were received some five months after the issuance of the policy, Mr. Esfeld refused additional financing and suggested that the entire operation be refinanced in the State of Oregon for reasons as expressed by Van Meter himself as follows

"Answer: Well, they didn't like to do it because I would be out of the State—and so far out of the State. Walola is quite a long ways away. They suggested that I try to get it refinanced in Oregon some place if I was going to leave the state." (Tr. 87)

Also Van Meter himself admits that it was not until the time of this refinancing that he definitely decided to go to Oregon (Tr. 72).

He further states that he then went to Portland and was able to arrange refinancing within two or three days (Tr. 87). The refinancing concern, appellants Granning and Treece of Portland, Oregon, wrote the American Discount Company under date of April 20,

1945, enclosing a check for the full amount owed by appellant to the American Discount Company and requesting that all "papers, titles, notes, mortgages, insurance policies and other papers" be forwarded in accordance with an enclosed authorization signed by appellant Van Meter. These documents were introduced in evidence as defendant's Exhibit A-2 and appear upon pages 62, 63 and 64 of the transcript.

At this time the insured property was still located in the State of Washington and it was not moved to Oregon until after the refinancing transaction was completed. Appellant Van Meter testified:

> "Answer: Yes, you see I wouldn't move the equipment out of the State until this finance company was satisfied up here.
>
> Question: So if the evidence shows that they were paid off about April 20 then you would say what as to the time of your moving?
>
> Answer: Between April 20 and the 10th of May would cover it easy enough. We were several days getting over there." (Tr. 88)

Prior, therefore, to the removal of the insured property from the State of Washington, the policy in suit was received by appellants Granning and Treece, the Portland finance company, who obviously, at least insofar as appellee is concerned, took possession of it as representative of all appellants and it was then examined as to acceptability by John Mullins, their office manager, who made no suggestion except to request an endorsement naming his firm as loss payee.

Appellants then had possession over six months

prior to the loss of the insurance policy which plainly restricted its coverage to losses occurring within the State of Washington. At the time of the refinancing the property was in the State of Washington and if the appellants saw fit to move it out of the coverage limits the burden was upon them to arrange other insurance or to specifically submit to appellee company the question as to whether or not it would extend its coverage and if so for what additional premium.

It is to be noted that there is no contention that appellee or anyone connected with it had any knowledge of the ultimate moving of the equipment to California where the loss actually occurred (Tr. 119-120).

A more detailed resume of the facts upon particular points will be set forth in the argument relating thereto.

ARGUMENT

Appellants segregate their argument into the following headings:

1. Appellants entitled to jury trial.
2. Facts entitle appellants to reformation of policy.
3. Appellants are entitled to recover on theory of waiver and estoppel.
4. The decision of the Ninth Circuit Court of Appeals in case of *Fidelity Guaranty & Fire Corporation v. Bilquist*, 99 F.(2d) 333, 108 F.(2d) 713, is not decisive of the issues in this case.
5. The court erred in sustaining challenge to sufficiency of appellants' case and denying motion for new trial.

We will cover substantially the same ground under the following headings which will be discussed in order:

1. Coverage of an insurance policy may not be extended from one state to another by waiver or estoppel but such extension can only be accomplished by reformation.
2. Reformation will be granted only where it appears by clear, cogent and convincing testimony that there was mutual mistake or fraud on the part of the insurance company.
3. The insured is presumed and required to know the provisions of an insurance policy and must seasonably advise the company if he objects thereto. Failure to do so will constitute negligence which will prevent reformation.
4. There was no error in the denial of a jury trial.
5. The trial court was correct in granting dismissal at close of appellants' case.

Before proceeding with a discussion of the above mentioned points separately, general comment will be made as to the facts and the rulings of the Washington Supreme Court in connection therewith in the case of *Carew, Shaw & Bernascoin, Inc. v. General Casualty Co.*, 189 Wash. 329, 65 P.(2d) 689, for the reasons hereinafter set forth. It is indeed seldom that every pertinent material issue involved in a piece of litigation is found to have been decided by the Supreme Court of the very state wherein the cause of action arose. The *Carew* case, *supra*, does that very thing for the case here under consideration and since the issues are to be determined according to the law of the

State of Washington (*Erie Railway Co. v. Tompkins*, 304 U.S. 64), the *Carew* case alone should be conclusive to the effect that the judgment of dismissal as entered by the trial court should be affirmed.

That case involves a policy of burglary insurance upon a safe. A preliminary written binder had been issued covering burglary from the entire safe. The policy as subsequently written restricted coverage to burglary from a chest located within the safe. The policy was issued for a three-year term and a little over a year from the inception date the safe was burglarized, $14,000.00 being taken therefrom but nothing from the chest inside. The insurance company denied liability upon the ground that its policy covered only burglary from the chest and the insured brought suit contending, first, that the company was prevented under the doctrine of waiver and estoppel from urging the coverage limitation, and, second, that the policy should be reformed so as to cover the entire safe.

Trial was had to a jury which returned a verdict in favor of the plaintiff but the trial judge entered judgment non obstante verdicto in favor of the defendant.

In affirming this judgment and disposing of the various issues, which are identical to those in the case at bar, the Washington Supreme Court used the following wording:

> "The respondent does not seek to void the policy for breach of any condition or for any other reason. This is a case in which the assured seeks

to extend the coverage of the policy. That can be done only by reformation. (page 336)

"One may not, by invoking the doctrine of estoppel or waiver, bring into existence a contract not made by the parties and create a liability contrary to the express provisions of the contract the parties did make. The general rule is that, while an insurer may be estopped, by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, yet under no conditions can the coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel. (page 336)

"The sole question presented was an equitable one; therefore, the verdict of the jury is in no way conclusive, it is merely advisory. (page 336)

"The rules of law governing the reformation of written agreements are applicable to the reformation of an insurance policy. An insurance contract is no different from any other contract, when the rules of law governing the reformation of written agreements are to be applied to it. *Bjorklund v. Continental Casualty Co.*, 161 Wash. 340, 297 Pac. 155. It is a rule so well-settled as to need no citation of sustaining authority that a written instrument, which constitutes the contract between two parties, will be reformed only when fraud or mistake is shown by clear, cogent, and convincing evidence. If, as in the case at bar, the evidence is in sharp conflict or any doubt exists as to the intent of the parties, reformation will not be granted." (pages 336-337)

"Even if we did not agree with the trial court that the policy truly reflects the quotation made to Shaw, the negligence of appellant would defeat

> its action for reformation. Appellant is presumed and is required to know the provisions of the insurance contract, as it would any other written contract into which it enters. It will not do for appellant's vice-president to say that he did not read the policy. Whether he or any of the other officers or agents of appellant read the policy, is immaterial. It was appellant's duty to read the policy, and the law says that that was done. *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 Pac. 955; *Hayes v. Automobile Ins. Exchange*, 126 Wash. 487, 218 Pac. 252; *Perry v. Continental Ins. Co.*, 178 Wash. 24, 33 P.(2d) 661; *McCann v. Reeder*, 178 Wash. 126, 34 P. (2d) 461; *Kelley v. von Herberg*, 184 Wash. 165, 50 P.(2d) 23."

It will be seen that each of the involved issues is succinctly disposed of in the foregoing decision.

In the case of *Fidelity & Guaranty Fire Corporation v. Bilquist*, 108 F.(2d) 714, the decision referred to by the trial judge, in orally announcing that he would dismiss appellants' case as showing no grounds for relief, this court has specifically approved and adopted the major principles of the *Carew* case, *supra.*

Since the facts in that case also were surprisingly similar to those in the case at bar, we will also discuss this decision preliminarily.

These facts may most easily be chronicled by a direct quotation from the decision itself, where in it is stated:

> "Sometime prior to July 23, 1935, appellee John Myhre and appellee Bilquist bought real property at Manchester, Kitsap County, Wash-

> ington, consisting of four lots with a building thereon, known as the Manchester Inn. On July 23, 1935, appellee executed a note secured by the property purchased to the Kitsap County Bank for $1500.00 which was used as part of the purchase price for the property. Frank E. Langer was president of the Bank, and he was also an agent of appellant for soliciting and writing insurance. He asked and secured from Myhre permission to write the insurance on the property, required by the bank on all such property upon which a loan was granted. Langer had known for several years that the property in question had not been used exclusively as a dwelling place, but that it was intended to be and was actually used instead as an inn, hotel and tavern. He asked for no information but filled out a form which was sent to Seattle, and the policy in question was prepared and sent back to him. Langer signed the policy as resident agent, and placed it with the note and mortgage, then in the Bank's possession." 108 F.(2d) 713.

The policy as issued covered a dwelling house, and, a loss having occurred, the insurance company defended, among other things, upon the ground that at the time thereof the premises were being used as a hotel, inn and tavern. In reviewing the decision of the trial court, which had granted reformation, the Circuit Court stated:

> "The law of Washington is well settled to the effect that one who will not use the opportunities open to him to determine what his contract is, and if such opportunities would probably have

> revealed the defect, he cannot have reformation for mistake. * * * "

It is further stated:

> "Certainly the insured has some duties as well as the insurer. The insured owes the obligation to examine his policy and to inform the insurance company wherein it is not as he intended it."

Further reference will be made to both the *Carew* and *Bilquist* cases in the various specific subheadings hereinafter discussed.

1. Coverage of an Insurance Policy May Not Be Extended from One State to Another by Waiver or Estoppel but Such Extension Can Only Be Accomplished by Reformation.

In the middle of the pertinent coverage provisions of the policy sued upon, to-wit, between paragraph 2, which delineates the machinery covered, and paragraph 4, which specifies the perils insured against, is found paragraph 3, which reads:

> "This insurance covers only within the limits of the state of Washington." (Tr. 12)

The case of *Carew, Shaw & Bernasconi, Inc., v. General Casualty Co.*, 189 Wash. 329, 65 P.(2d) 689, to which we have hereinbefore referred at some length, definitely and unquivocally lays down the rule which we have set forth in this heading and we refer to our quotation therefrom upon page 8 of this brief.

The decision recognizes that waiver or estoppel may operate to prevent an insurance company from urging a breach of warranty or condition which would other-

wise void a policy but definitely holds that the doctrine cannot be used to enlarge or extend the coverage itself.

Appellant cites the Washington case of *Reynolds v. Canton Insurance Office*, 98 Wash. 425, 167 Pac. 1115, which involves, not a limitation of coverage, but a warranty as to the waters wherein a vessel would be operated. *Dicta* is also cited from the case of *Henslin v. U. S. Fire Ins. Co.*, 152 Wash. 637, 278 Pac. 702, which was not necessary to the decision involved and which in any event should be considered as being expressly overruled by the definite wording in the *Carew* case, *supra.* Texts and decisions from other states are also cited but we are governed here by the law of the State of Washington and this is set forth in the *Carew* case.

While the aforesaid rule would seem conclusive, we will nevertheless discuss briefly the factual situation relating to this claim of waiver and estoppel.

Appellants base their argument upon the proposition that appellee's agent, and persons whom appellant Van Meter had the right to assume were appellee's agents, had knowledge of his contemplated move to Oregon; that appellee issued an endorsement changing the name of the loss payee on his policy from the American Discount Company to appellants Granning and Treece, and that appellee's agent mistakenly attempted to collect the balance of the premium due under the policy. With regard to the premium, the fact was that payment of the balance due had been included in the refinancing check sent by Granning and Treece to the American Discount Company, but

this fact was unknown to Morton Pinch of the agency firm. (Tr. 144)

It is to be remembered that at the time the American Discount Company in response to specific requests of appellants Granning and Treece accompanied by the authorization of appellant Van Meter (Defendant's Exhibit A-2. Tr. 62, 63 and 64), forwarded the policy to them in Portland, the insured machinery was still in the State of Washington and within the coverage of the policy. (Tr. 88)

As far as the American Discount Company was concerned, which company, incidentally, has no connection with appellee, it was merely following instructions in forwarding the policy and other papers to appellants Granning and Treece who were taking over the financing. If and when the subject of insurance was actually moved out of the State of Washington so that it would not be covered by the policy of insurance, the burden would seem to be upon Granning and Treece to either procure other coverage or specifically submit to appellee insurance company the proposition as to whether it would extend its coverage to the State of Oregon and, if so, for what additional premium.

The office manager for Granning and Treece, John Mullins, examined the policy and made no other request than that a loss payable endorsement be issued in favor of Granning and Treece (Tr. 125, 126 and 127). There is no mention in this request as to whether or not the equipment had been moved to the State of Oregon (Tr. 58, 59), and in fact it does not

definitely appear anywhere in the record exactly when the move was made, appellant Van Meter simply stating that it was somewhere between April 20th and May 10th (Tr. 88).

This correspondence was directed to the attention of the Lipman & Esfeld insurance agency and was handled by Morton Pinch, one of the partners therein, who, probably because of the fact that the equipment was being refinanced and having no knowledge that the refinancing check included the premium balance, immediately made an effort to collect the balance of premium he thought to be owing.

While in the course of correspondence relating to the premium, Pinch received information from which it could be logically inferred that the insured property had been moved to the State of Oregon, he was never at any time requested to take up with the company the question as to whether or not the coverage would be extended. Also, at the time he did not even have in mind the fact that the policy contained a provision restricting its coverage to the state of Washington (Tr. 139, 140).

It is obviously impossible for an insurance agent to keep in mind at all times the various provisions of the numerous policies issued for a great number of different insureds and to determine whether certain facts which may come casually to his knowledge might constitute a violation of some of such provisions.

As herein before stated, appellants had exclusive knowledge of all the pertinent facts, they were legally

bound to know the terms of the policy, and when they moved the property out of the state the burden was on them to make provision to have it covered in the new location.

Another and most decisive point is that it is nowhere contended that appellee or its agents had any knowledge whatsoever of the subsequent removal of the equipment from the state of Oregon to the state of California some five months prior to its destruction by fire.

Even if, by some stretch of the imagination, it should be held that there was a waiver or estoppel which would operate to extend the coverage into the state of Oregon, how could it be similarly extended to cover a loss in California when neither the company nor its agents even know that the equipment had been sent down there?

It is submitted, first, that policy coverage cannot be extended by waiver or estoppel, second, that there are no facts to support waiver or estoppel, and, third, that it would in no event extend to the move to California.

2. Reformation Will Be Granted Only Where It Appears By Clear, Cogent and Convincing Testimony that There Was Mutual Mistake or Fraud on the Part of the Insurance Company.

The rule of law laid down by this heading has been adopted by the Supreme Court of the State of Washington in the *Carew* case, *supra*, and we refer to the applicable quotations on page 8 of this brief.

An examination of the facts will reveal that appellants have entirely failed to sustain this burden.

Appellants begin their argument upon this point with the statement that Esfeld, while apparently acting on behalf of the insurance local agency firm of Lipman & Esfeld, agreed to issue a policy which would cover in any state in the United States. We submit that, as stated in our opening comments upon the facts, the record does not substantiate this contention.

Appellants' contentions with reference to reformation are based entirely upon the testimony of the appellant Van Meter and his statements fall far short of complying with the requirement.

The most that can be said for the portions of the record referred to in appellants' brief upon this point is that there was some discussion of a marine type of policy which would cover without limitation as to location and that the appellant Van Meter concluded that this was the kind of policy he was to have. In answering specific inquiries made by the court, however, Van Meter carefully avoided making any statement to the effect that Esfeld actually agreed to issue such a policy. We refer to the following questions and answers.

> THE COURT: Did he say anything about it covering property out of the state of Washington?
>
> THE WITNESSS I don't think so. I don't think it was discussed either way. (Tr. 117)

THE COURT: What was said by either of you or him about insurance that covered you out of the State of Washington?

THE WITNESS: Well, I can't positively say just what was said.

THE COURT: Was there anything said about it?

THE WITNESS: I just wouldn't want to answer that yes or no and be honest with you." (Tr. 118)

In this testimony the appellant Van Meter was relating to a conversation had between himself and Sol Esfeld, an officer of the American Discount Company, a finance concern, and a former owner of the insurance local agency of Lipman & Esfeld. Van Meter had called upon Esfeld for the purpose of financing the purchase of his equipment and in connection therewith also made arrangements for the placing of insurance.

According to Morton Pinch, one of the partners in the Lipman & Esfeld insurance agency and the person who countersigned the policy on behalf of such agency, the order for the insurance was relayed by Sol Esfeld to an employee of the insurance agency who, in turn, forwarded the information relating thereto to the Seattle branch office of appellee insurance company for the reason that such branch office passed upon this type of risk and did the actual physical work of preparing the policy to be issued (Tr. 141, 142). When the policy was so issued by the branch office of appellee company it was forwarded to the agency, examined and countersigned by Mr. Pinch and delivered to the

American Discount Company as mortgagee of the equipment (Tr. 142).

An examination of the policy of insurance which was introduced in evidence as Plaintiff's Exhibit No. 1 and the original of which, as appears on page 72 of the Transcript was forwarded to this court as a part of the record on appeal, will reveal that the basic policy is a transportation policy, the printed conditions of which limit the coverage to the United States and Canada but that there was attached thereto a form entitled "Inland Marine Department. Contractor's Equipment Floater Insurance," paragraph 2 of which contains a typewritten schedule of the machinery insured, paragraph 3 containing the printed wording:

> "This insurance covers only within the limits of the State of ....."

in which blank the word "WASHINGTON" is typed in capital letters. Paragraph 4 contains a list of the hazards insured against.

It would be utterly impossible for any one making a real check of the property covered and the hazards insured against to overlook this plainly designated coverage restriction as to location.

It is well settled law that such a specific coverage limitation, especially when partially typewritten upon the coverage form or rider, will prevail over the broader provisions of the basic policy. Am. Jur. 29, Insurance, Sec. 162, page 178. Cooley's Briefs on Insurance, 2nd Ed., Vol. 2, page 1012. Couch's Cyclopedia

of Insurance Law, Vol. 1, page 312. *Miller v. Penn Mutual Life Ins. Co.*, 189 Wash. 269, 64 P.(2d) 1050; see page 276 of the Washington report.

It is entirely plain that, insofar as the appellee insurance company is concerned, it intended to and did issue a policy covering only within the limits of the State of Washington.

Certainly it cannot be said that the appellant has met the burden of establishing by clear, cogent and convincing evidence that there was fraud or mistake on the part of the insurance company.

3. The Insured Is Presumed and Required to Know the Provisions of An Insurance Policy and Must Seasonably Advise the Company If He Objects Thereto. Failure To Do So Will Constitute Negligence Which Will Prevent Reformation.

This rule is strongly set forth in the two leading cases which are primarily decisive of the issues here presented, to-wit, *Carew, Shaw & Bernasconi, Inc. v. General Casualty Co., supra,* and *Fidelity & Guaranty Fire Corporation v. Bilquist, supra,* both of which cite many Washington cases in substantiation thereof.

Appellants cite cases from certain other jurisdictions which it is claimed lay down a contrary rule. We are here, however, concerned with the rule of the State of Washington and it is so well settled that there is no need to consider outside authority.

Appellants further contend that the application of this rule would seemingly prevent reformation under all possible circumstances. This is obviously not the

case, as the rule would not apply where a loss occurred before the insured had had a reasonable opportunity to examine the policy, discover the mistake and advise the insurance company thereof. The rule is simply to the effect that an insured, like any other party to a contract, must use reasonable diligence to apprise himself of the terms thereof and, if they are not in accord with his original understanding, to promptly advise the other party of his contention.

In the case at bar, the policy was issued as of November 10, 1944 (Tr. 11), was held by the American Discount Company as mortgagee until April 20, 1944, at which time, at the specific request of appellant, it was sent to appellants Granning and Treece in Portland and remained in their possession up to the time of the loss in October.

Thus the appellant Van Meter had approximately eleven months within which to examine and make objections to the policy.

Appellants contend that they should not be bound by the rule because appellant Van Meter did not, in fact, actually see the policy. According to the cases herein before cited, however, it was his duty to see it and it is immaterial that he did not exercise his privilege.

This particular point has again been ruled upon by the Washington Supreme Court in the recent case of *Department of Labor & Industries v. Northwestern Mutual Fire Association*, 13 Wn.(2d) 288, 124 P.(2d) 944, wherein the court states, upon pages 292 and 293, as follows:

> "Respondents particularly stress the fact that the appellants mailed the policy to the Public Utilities Commissioner of Oregon, where it was held until after the accident, and the insured had never read it. This circumstance was not material. The insured operated his truck part of the time in Oregon, and it was for his benefit, and we may assume at his direction, that the policy was deposited with the Utilities Commissioner of that state. He could have read it had he so desired—the appellant did nothing to withhold or conceal it from him—and he was bound by its provisions."

Appellants fall squarely within the rule of these cases and their negligence in failing to discover and call to the attention of the appellee company the claimed mistake prevents them from now seeking reformation.

4. There Was No Error in the Denial of a Jury Trial.

The judgment of dismissal from which this appeal was taken was entered at the close of appellants' case in sustaining a challenge to the sufficiency of appellants' evidence to entitle them to any relief. If the trial judge was correct in this ruling, then obviously the case would be subject to dismissal regardless of whether or not it was being tried before a jury.

This question of right to jury trial should, therefore, be subject to consideration upon this appeal only in the event that this court should find that the trial judge was in error in dismissing the case and should order the same sent back for a new trial. It would then

be necessary to determine whether any part of such new trial should be before a jury.

Appellants concede that if their entire case was based upon a plea for reformation of the insurance policy, they would not be entitled to a jury trial. They contend, however, that they were relying upon an additional ground of waiver and estoppel, which issue was triable before a jury.

Under heading No. 1 of this brief, we have submitted argument that the doctrine of waiver and estoppel cannot be invoked to enlarge or extend the coverage of an insurance contract and that there was not, in any event, sufficient evidence upon which to base a finding of waiver or estoppel. If we are correct in either of these contentions, then obviously there is no right to a jury trial.

We further contend that where a case is primarily of equitable cognizance it is discretionary with the trial judge as to whether he will submit any issue to a jury. See *Fitzpatrick v. Sun Life Assurance Company of Canada*, 1 Fed. R. Dec. 713.

5. The Trial Court Was Correct in Granting the Dismissal at Close of Appellants' Case.

In announcing this dismissal, the trial court made specific reference to a Ninth Circuit decision which it is conceded was the case of *Fidelity & Guaranty Fire Corporation v. Bilquist, supra*, from which we have heretofore quoted at length. This decision was, in turn, based in good part upon the case of *Carew, Shaw & Bernasconi v. General Casualty Co., supra*, from which we have also quoted at length.

The factual situation in both of these cases was very similar to that in the case at bar and an analysis will show that the positions of the plantiffs in both the aforementioned cases were more favorable than that of appellants.

Appellants have sought to differentiate these decisions and most of the points raised have heretofore been discussed. On pages 26 and 37 of their brief, appellants seek to establish that the coverage restrictions in the *Carew* and *Bilquist* cases, respectively, were of great importance and affected the premium rate whereas in the case at bar the restriction of coverage to the state of Washington was a minor matter which would have no connection with the rate.

It is submitted, on the contrary, that it is common knowledge that every material portion of the subject of coverage, hazards protected against, and location of the risk is part of the essential consideration for a premium on an insurance policy.

There are many differences in the hazards of logging operations as between different locations. Certainly it cannot be said that an insurance company does not have the rght to determine for itself under what conditions and circumstances it will assume a risk and the locality to which it will restrict its coverage. It does not lie in the mouths of appellants to state that it is immaterial to appellee insurance company as to whether its liability is restricted to the State of Washington or whether it will cover elsewhere.

The fact remains that the very fire which caused

the damage did not take place in the State of Washington but in the State of California, many hundreds of miles away and under entirely different climatic conditions.

Another point raised by appellants on page 32 of their brief which we have not as yet referred to is as follows. The cancellation provision of the policy is set out to the effect that if the policy is canceled, shall become void or cease, the company shall, upon surrender of the policy, pay a return premium. It is then suggested that since the policy did not cover outside the State of Washington the company should have returned a premium when the insured property was moved into the State of Oregon.

There are two answers to this contention. First, under the policy provision no return premium is due until the policy is surrendered by the insured. The insured did not surrender the policy but on the contrary specifically directed that it be forwarded to Granning and Treece in Portland. Second, at the time of such forwarding the property was still in the State of Washington, subject to the coverage of the policy. The policy would still cover any loss in the State of Washington and even after the property had been moved to Oregon it could still have been returned to Washington so as to come within the coverage. It was, in fact, moved from Oregon to California five months prior to the loss and such move could just as easily have been made to the State of Washington.

To conclude:

1. Appellants have failed to establish mutual mistake or fraud on the part of the insurance company by clear, cogent and convincing testimony but, on the contrary, it affirmatively appears that appellee insurance company never intended or agreed to issue any type of coverage other than that afforded by the policy as written.

2. Appellants were guilty of negligence in failing to discover and give attention to the fact that the coverage was restricted to the State of Washington and are, therefore, prevented from now seeking a reformation to recover a loss occurring in the State of California approximately eleven months after the issuance of the policy.

3. Appellee has been guilty of no act tending to mislead appellants, appellants being particularly conversant with the location of their property and having the duty in the event they desired an extension of coverage to request the same of appellee company, giving it the opportunity of determining whether it wished to cover first in Oregon and secondly in California and, if so, at what rates.

4. Coverage provisions of the policy cannot be extended by waiver or estoppel.

5. The trial court was correct in entering judgment of dismissal at the close of plaintiffs' case.

Respectfully submitted,

CLARKE, CLARKE & ALBERTSON,
GEORGE W. CLARKE,
Attorneys for Appellee.